

**Geoffrey C. Angel**  
**ANGEL LAW FIRM**  
**803 West Babcock**  
**Bozeman, Montana 59715**  
**Tel: (406) 922-2210**  
**Fax: (406) 922-2211**  
**christianangel@hotmail.com**

**Attorney for Plaintiff**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
HELENA DIVISION**

**BREANNE CEPEDA,**

**Plaintiff,**

**vs.**

**MONTANA STATE  
UNIVERSITY,**

**Defendant.**

**Cause Number CV-13-59-H-SEH**

**CEPEDA'S RESPONSE IN  
OPPOSITION TO MSU'S  
MOTION TO DISMISS**

This is not a case of sexual harassment this is a case of sexual assault. Breanne Cepeda, formerly Cutler, filed and resolved a claim of sexual harassment against MSU and Komiyama before the Human Rights Bureau. This case does not involve harassment but involves only sexual assault which was not before the Human Rights Bureau. MSU's motion to dismiss must be denied. MSU seeks to use its admission of Human Rights violations as a shield against its other unlawful conduct. There is no factual or legal support for this motion. The issue presented is whether MSU can violate Title VII of the Civil Rights Act and Montana's Human Rights Act (MHRA) and at other times violate other laws? In other words, is Breanne Cepeda entitled to a remedy for Human Rights violations and also entitled to a remedy for other unlawful conduct or does MSU's liability for sexual harassment immunize MSU from its other unlawful conduct?

1 The Court must deny the motion to dismiss because the facts concerning the  
2 sexual assaults and related injuries and damages were not before the MHRB.  
3 MSU's admission of Human Rights violations and payment of damages for those  
4 acts does not preempt or otherwise resolve Cepeda's injuries or damages from  
5 sexual assault. Cepeda filed an administrative charge of discrimination against  
6 MSU and Komiyama for sexual harassment which the law required her to do.  
7 Cepeda could not include her claims of sexual assault. Cepeda filed this civil suit  
8 against MSU and Komiyama to pursue those claims. The parties are the same but  
9 the facts, injuries and damages are not.

10 MSU now moves to dismiss this suit brought against it for negligent hiring,  
11 retention and supervision and negligent infliction of emotional distress, violation of  
12 Title IX of the Education Amendment Act of 1972 and civil rights violations under  
13 42 U.S.C. § 1983. MSU claims because it admitted violating Title VII and the  
14 MHRA it cannot now be found to have committed any other wrongs. MSU's  
15 argument is that the sexual harassment claims are identical to or subsumed within  
16 its other unlawful conduct. But, the conduct and the injuries are distinct and the  
17 conduct complained of in this suit is not covered by either Title VII or the MHRA.

18 In an oversimplification, Cepeda complained of sexual harassment before  
19 Montana's Human Rights Bureau. MSU admitted liability and confessed  
20 judgment. Cepeda accepted MSU's confession for the claims pending before the  
21 MHRB. MSU requested a global release which Cepeda rejected. Cepeda then  
22 complained of forced sexual contact, infliction of emotional distress, violation of  
23 Title IX and her Constitutional rights in state court. MSU submitted itself to suit in  
24 federal court and now seeks immunity for these acts based on its prior admission of  
25 sexual harassment. The conduct complained of is different, occurring on different  
26 days and causing different damages under the law. A comparison of the conduct,  
27 the injuries and damages makes clear they are separate wrongs with separate  
28 remedies, that occurred at separate times.

<b>Title VII and MHRA</b>	<b>Negligent Hiring Retention and Supervision, Negligent Infliction of Emotional Distress</b>	<b>Title IX of the Education Amendment Act of 1972</b>	<b>Civil Rights Act 42 U.S.C. 1983</b>
Sexual Harassment	Sexual Assault	Hostile environment	Violation of Constitutional Rights
Conduct is unwanted sexual advances	Conduct is forced sexual contact	Conduct denies benefits of education	Conduct violates established Constitutional rights
General damages under Title VII and MHRA	Medical expense, pain, suffering, anxiety and loss of course of life <sup>1</sup>	General and special damages <sup>2</sup>	General and special damages under state tort law <sup>3</sup> , costs and attorney fees <sup>4</sup>

Cepeda filed her first Amended Complaint which does not include Komiyama or the claims against him. Cepeda also dismissed the federal causes of action against MSU. Therefore, the remaining claims are against MSU alone and consist of Negligent Hiring, Retention and Supervision and Negligent Infliction of Emotional Distress based on the sexual assaults alone.

With this amendment the precise issue presented here has been addressed by the Montana Supreme Court in the landmark case of *Saucier v. McDonald's Restaurants of Montana, Inc.*, 2008 MT 63, 342 Mont. 29, 179 P.3d 481. Saucier was severally mentally disabled. *Saucier* at ¶¶ 7-11. She was hired to work at McDonald's as a lobby person. *Id* at ¶ 12. Shortly thereafter, she began a sexual relationship with her Manager. *Id* at ¶ 13. The relationship went awry and Saucier's limited Conservator filed a charge of sexual harassment against her

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<sup>1</sup>Section 27-1--201, et seq.

<sup>2</sup>Franklin v. Gwinnett County Schools, 112 U.S. 1028 (1992).

<sup>3</sup>Carey v. Phipps, 435 U.S. 247 (1978).

<sup>4</sup>42 U.S.C. § 1988.

1 Manager and the Restaurant before the MHRB. *Id at ¶ 22*. Saucier alleged gender  
 2 discrimination and a sexually hostile work environment. *Id*. The MHRB found  
 3 against Saucier because it concluded the sexual relationship she had with her  
 4 Manager was consensual and therefore excluded from the definition of  
 5 discrimination. *Id at ¶ 24*. Saucier then filed a civil action in state court based on  
 6 the alleged sexual harassment and alleged sexual assaults. *Id at ¶ 27*. The  
 7 Defendants moved to dismiss Saucier's tort claims as barred by the MHRA and  
 8 moved to dismiss the discrimination claims on the merits. *Saucier at ¶ 29*. The  
 9 district court granted McDonald's motions concluding the tort claims were barred  
 10 by the exclusive remedy provision within the MHRA. *Id*. The district court left  
 11 remaining the discrimination claims against the Manager. Saucier then entered  
 12 into a confession of judgment with her Manager for \$500,000. *Id at ¶ 30*. Saucier  
 13 appealed the dismissal of her tort claims. *Id at ¶ 31*. The Supreme Court reversed  
 14 based on an error of law. *Id at ¶*. The Supreme Court held sexual assault does not  
 15 fall within the definition of sexual harassment and cannot be covered by damages  
 16 awarded for sexual harassment. *Id at ¶ 68*. "[T]he MHRA establishes procedures  
 17 and remedies, separate from tort law, for legal redress of conduct which falls  
 18 within the definition of unlawful discrimination." *Id at ¶ 39*. "[N]on-consensual  
 19 sex goes beyond any reasonable conception of 'sexual harassment' and falls  
 20 outside the MHRA's definition of 'discrimination.'" *Id at ¶ 71*. "Simply put,  
 21 allegations of non-consensual sex sound in tort and not in discrimination." *Id at ¶*  
 22 *71*. Thus, Saucier was permitted to recover a judgment of \$500,000 for sexual  
 23 harassment and still pursue her tort claims for the sexual assaults.

24 The *Saucier* Court considered and rejected the objection that the claims  
 25 arise from the same facts and the same parties and therefore should be barred. It  
 26 did so by examining *Vettel-Becker v. Deaconess Medical Center, 2008 MT 51, 341*  
 27 *Mont. 435, 177 P.3d 1034*. In *Vettel-Becker* the plaintiff was terminated and  
 28 alleged his termination was due to discrimination. *Id at ¶ 23*. He filed a charge

1 before the MHRB and later filed a claim in state court alleging his termination  
2 violated Montana's Wrongful Discharge from Employment Act (WDEA). *Vettle-*  
3 *Becker at* ¶ 23. The MHRB dismissed the discrimination claim. *Id.* Defendant  
4 then moved to dismiss the WDEA claim based on the exclusive remedy provision  
5 in the MHRA which the district court granted. *Id at* ¶ 24. The Supreme Court  
6 reversed noting that Vettle-Becker's claim under the WDEA is not based upon  
7 allegations of discrimination. In other words, the jury could find a wrongful  
8 discharge without proof of a pattern or practice of discrimination. "Discrimination  
9 can occur without a wrongful discharge and wrongful discharge can occur without  
10 a discriminatory act." *Vettle-Becker at* ¶ 40. Importantly, Vettle-Becker suffered a  
11 single injury but was allowed to pursue two successive alternate theories of  
12 recovery. By contrast, both Saucier and Cepeda suffered injuries due to sexual  
13 harassment and separate injuries due to sexual assault.

14 Saucier's proof of sexual harassment was a sexually hostile and offensive  
15 environment altering the terms of her employment and work schedule. Saucier's  
16 proof of sexual assault were on and off-premises sexual contact and alleged non-  
17 consensual sex. Saucier's Manager confessed judgment for \$500,000 on the sexual  
18 harassment claims. The Supreme Court held Saucier could still pursue her claims  
19 of sexual assault because they do not fall within the definition of discrimination  
20 and could not form the basis for her charge before the MHRB or the confessed  
21 Judgment. "If the alleged conduct falls outside the MHRA's definition of unlawful  
22 discrimination, the plaintiff may maintain a tort action." *Saucier at* ¶ 79.

23 Similarly, Cepeda's proof of sexual harassment before the MHRB was that  
24 Komiyama created a sexually hostile and offensive environment subjecting her to  
25 discrimination in violation of Title VII and the MHRA. Cepeda's proof of sexual  
26 assault involves on and off-premises coerced sexual contact and sexual assault. As  
27 the victim of both courses of unlawful conduct, it is not Cepeda's fault Komiyama,  
28 with MSU's knowledge, was both discriminating against her and assaulting her.

1 While the action before the MHRB was able to redress one of these wrongs it was  
2 not able to provide a remedy for the sexual assaults.

3 MSU seeks to use its confession of liability for sexual harassment as a shield  
4 against its other wrongs by arguing the sexual assaults are precluded under the  
5 doctrine of *res judicata*. *Res judicata* requires the parties, underlying facts and  
6 injuries to be the same. It prevents a party from recovering damages from the  
7 defendant twice for the same injury. *Res judicata* does not apply because the  
8 subject matter of the present and past actions are not the same, the injuries are not  
9 the same and they did not occur at the same time. Cepeda could not have litigated  
10 the claims set forth in this action before the MHRB or sought damages for the  
11 sexual assaults before the MHRB because sexual assault does not fall within the  
12 definition of discrimination. This is the current state of the law in Montana.

13 MSU asks this Court to apply state law principles of *res judicata* relying on  
14 *Costanich v. Dept. of Soc. And Health Serv.*, 627 F.3d 1101, 1007 n. 10 (9<sup>th</sup> Cir.  
15 2010). Interestingly, in *Costanich* plaintiff filed an administrative action and a  
16 subsequent state court action. The defendant removed the matter and was granted  
17 summary judgment based on Eleventh Amendment immunity, not *res judicata*. In  
18 fact, the district court allowed the subsequent claims which did not raise the same  
19 issues presented in the Administrative claim. “The district court correctly held that  
20 the doctrine of collateral estoppel inapplicable because the issues considered by the  
21 state courts and the administrative agency were not identical to those presented in  
22 this federal action.” *Id.* This Court should reach the same result based on  
23 Montana’s principles of *res judicata*.

24 Montana defines *res judicata* in terms of “primary rights” holding that a  
25 claim consists of all the effects and consequences of a violation of a primary right.  
26 So long as the right violated was not litigated in the prior action there is no factual  
27 basis upon which *res judicata* could apply. In this case, Cepeda’s right to be free  
28 from sexual assault was not before the MHRB nor was it remedied. Cepeda’s

1 primary right litigated before the MHRB was the right to be free from the  
2 consequences of discrimination. Discrimination includes sexual harassment but  
3 does not include sexual assault. Cepeda's primary right brought in this case is the  
4 right to be free from sexual assault. MSU argues these two rights are all part of the  
5 same transaction and therefore are barred by *res judicata*.

6 MSU relies on the district court's decision in *Slice v. Ferriter*, 2009 WL  
7 2948582, to support its *res judicata* argument. In *Slice* the district court dismissed  
8 a subsequent federal claim for discrimination against the Montana Department of  
9 Corrections because Slice raised and resolved the same allegations before the  
10 MHRB. Slice was not raising any new, additional or different facts but was  
11 complaining of the same conduct she complained of before the MHRB and the  
12 same injury. While Cepeda and Saucier both complained of other wrongs that  
13 were not part of the discrimination, Slice only complained of the same conduct  
14 which made up her charge of discrimination. *Slice* is factually distinct from  
15 *Saucier*, *Vettle-Becker*, and this case because in each of these cases the conduct  
16 which undergirds the claim for relief is distinct from the earlier claims before the  
17 MHRB. In fact, *Slice* supports Cepeda's position. In *Slice* the Ninth Circuit  
18 reversed Judge Strong because the claims of retaliation could not have been  
19 brought before the MHRB and were not subject to *res judicata*.

20 Cepeda's complaint alleges Komiyama subjected her to instances of coerced  
21 sexual contact and sexual assault. *Complaint at* ¶ 19. "Komiyama forced female  
22 students including Cepeda to perform sexual favors." *Id at* ¶ 31. During the later  
23 part of the semester Komiyama went to Cepeda's house, served her excessive  
24 amounts of alcohol, then engaged in sexual intercourse with her while she cried  
25 and repeatedly said 'no'." *Id at* ¶ 32. It is true Komiyama discriminated against  
26 Cepeda on some occasions. He sexually assaulted her on others. These claims  
27 occurred at separate times, require separate elements of proof and resulted in  
28 separate damages under the law.



1 For example, the relief granted before the MHRB was limited to the general  
2 damages Cepeda suffered due to sexual harassment. It could not, as a matter of  
3 law, have included compensation for the sexual assaults which are by definition  
4 not part of the charge of discrimination.

5 Cepeda's claims of negligent hiring, retention and supervision and negligent  
6 infliction of emotional distress are premised upon Komiyama's sexual assaults.  
7 They do not require proof of sexual harassment. The facts which support a claim  
8 of sexual harassment may prove relevant inquiry into whether MSU had notice  
9 Komiyama posed a threat of physical harm by way of coerced sexual contact or  
10 rape but the facts are not necessary proof of these claims. To prove negligent  
11 hiring, retention and supervision and negligent infliction of emotional distress  
12 Cepeda must prove MSU owed her a duty that it breached causing her damages.  
13 The underlying conduct is the sexual assaults. These unlawful acts are excluded  
14 from the definition of discrimination. The MHRB would not have heard evidence  
15 concerning this conduct because it is not relevant to the charge and is excluded  
16 from the definition of what could constitute sexual harassment. Cepeda could not  
17 have raised her claims or sought damages for sexual assaults before the MHRB.  
18 The claims are unrelated to sexual harassment. If Cepeda were permitted to file  
19 her claims of discrimination and negligence at the same time a jury would have  
20 been permitted to award separate damages for each separately.

21 Finally, to the extent the complaint can be read to allege claims under 42  
22 U.S.C. § 1983, assault and battery and for punitive damages against MSU those  
23 claims have been omitted from the amended complaint filed contemporaneously  
24 herewith. The arguments in this regard in MSU's motion to dismiss are moot.



1 DATED this 15<sup>th</sup> day of November 2013

2 \_\_\_\_\_  
3  
4 /s/ Geoffrey C. Angel  
5 Geoffrey C. Angel  
6 ANGEL LAW FIRM  
7 Attorney for Plaintiff

8 **CERTIFICATE OF COMPLIANCE**

9 I hereby certify this brief complies with the word length limits of Local Rule  
10 7.1(d)(2), United States District Court for the District of Montana, and contains  
11 2,430 words according to the word count of WordPerfect 12 excluding caption and  
12 certificates of service and compliance.

13 /s/ Geoffrey C. Angel  
14 Geoffrey C. Angel  
15 ANGEL LAW FIRM  
16 Attorney for Plaintiff

17 **CERTIFICATE OF SERVICE**

18 I hereby certify that on this 15<sup>th</sup> day of November 2013 I caused a true and  
19 correct copy of the foregoing document to be served upon the opposing party or  
20 counsel by electronic filing and via United States Mail, First Class mail, postage  
21 prepaid and addressed as follows:

22 W. Anderson Forsythe  
23 Moulton, Bellingham P.C.  
24 P.O. Box 2559  
25 Billings, Montana 59103

26 Rebekah J. French  
27 Risk Management & Tort Defense  
28 P.O. Box 200124  
Helena, Montana 59620

29 ANGEL LAW FIRM

30 /s/ Geoffrey C. Angel  
31 Geoffrey C. Angel  
32 ANGEL LAW FIRM  
33 Attorney for Plaintiff